8-10-2011

Johnson v. North Idaho College Appellant's Reply Brief Dckt. 38605

IN THE SUPREME COURT OF THE STATE OF IDAHO

VICTORIA JOHNSON,

Plaintiff/Appellant,

vs.

NORTH IDAHO COLLEGE, et al,

Defendants/Respondents.

Supreme Court Docket No. 38605-2011

REPLY BRIEF OF APPELLANT

Appeal from the District Court of the First Judicial District
of the State of Idaho in and for the County of Kootenai
the Honorable Lansing L. Haynes Presiding

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I. STATEMENT OF THE CASE

Nature of the Case, Course of the Proceedings, and Concise Statement of the Facts

The Nature of the Case, Course of the Proceedings, and Statements of Facts from the standpoint of each party are adequately set forth from each party's perspective in the Parties' respective briefs, and, as such, will not be re-iterated herein in the interest of brevity. Furthermore, Appellant herein will only directly address certain major issues discussed by the Respondent in its Brief, and will refer to, and incorporate by reference as though fully set forth herein, Appellant's Opening Brief with regard to the remainder of her argument.

With regard to the factual dispute set forth on Page 6 of Respondent's Brief, Respondent takes issue with Appellant's statement that "Throughout, Friis indicated that her grade could be affected by her response to his action," and then goes on to say that there is "no citation to the record." Respondent's Brief at 6. However, this statement is set forth on Paragraph 6 of Appellant's Affidavit in Opposition to Summary Judgment, submitted in response to Respondent's initial Motion for Summary Judgment filed in United States District Court for the District of Idaho (hereinafter "Federal District Court" or "Federal Court"), and in the record herein on page 235. Even if Respondent takes issue with this testimony from Appellant, it is not the province of the Court to determine credibility or weigh the facts at the summary judgment stage. *See Nelson v. Steer*, 118 Idaho 409, 410, 797 P.2d 117, 118 (1990). That is the province of the trier of fact. For the purposes of Summary Judgment, any factual dispute must be viewed in a light most favorable to the non-moving party. *Bonz v. Sudweeks*, 119 Idaho 539, 541, 808 P.2d 876, 878 (1991). Thus, Respondent's dispute of this factual allegation by Appellant does not

provide grounds for Summary Judgment in this case. It is simply fodder for cross-examination at trial.

II. ARGUMENT

A. The Standard Pursuant to the Idaho Human Rights Act (IHRA) Claims.

1. The Ninth Circuit's Determination Regarding the IHRA Standard is the Law of the Case.

In the first portion of its Argument, Respondent, once again, asserts that the more restrictive Title IX analysis should be applied to educational discrimination claims pursuant to the IHRA, as opposed to a Title VII analysis. Respondent's Brief at 12. Respondent then opines that the United States Court of Appeals for the Ninth Circuit (hereinafter "Ninth Circuit") erred in its ruling to the contrary. *Id.* However, Respondent did not seek *certiorari* to the United States Supreme Court, nor did it seek reconsideration or *en banc* review by the Ninth Circuit itself. Moreover, Respondent did *not cross-appeal* the District Court's determination as to the Title VII standard *following* remand to State Court, when it had the opportunity to do so. As such, even in the event that this Court may disagree with the Ninth Circuit's decision, that decision is now the law of this case, and binding upon the parties thereto.

While the instant situation, in which this Court is faced with an appeal of decision remanded by a Federal court, is somewhat unusual, the discussion of the Law of the Case Doctrine in the early Idaho case of *Hall v. Blackman*, 9 Idaho 555, 75 P. 608 (1904) remains instructive. There, this Court held that when a "question was directly raised upon [the first] appeal, and was squarely before the court, and its determination was essential to a determination of that appeal," *id.* at 609, "whatever the opinion of the court might be at [the time of second

appeal] as to the correctness of the conclusions there reached, or the soundness of any legal principle there announced, its judgment cannot now be invoked to disturb such questions as have become a final adjudication in the case." *Id.* In other words, as the rule is summarized in the headnotes to the reported version of the case, "the appellate court is bound by its decision on a prior appeal in the same cause, whether right or wrong." *Id.* at 608.

Here, the Ninth Circuit properly and appropriately reviewed a question of State law over which the Federal District Court had validly exercised supplemental jurisdiction. The issue of the appropriate analysis pursuant to an IHRA educational discrimination claim was "directly raised upon appeal, and was squarely before the [Ninth Circuit], and its determination was essential to a determination of that appeal." As such, the parties, and this court, are now bound by the decision, and, to the extent that this Court were to express disagreement, it would only be appropriate to do so by way of *dicta*, which would provide direction in future cases. Therefore, the Ninth Circuit's determination that a Title VII, rather than Title IX, analysis applies to an IHRA claim is the "law of the case," and should not be disturbed upon this appeal.

2. The Ninth Circuit's Determination Regarding the IHRA Standard is Correct.

Should this Court decide to revisit the issue as to the appropriate standard to apply in an IHRA educational discrimination case, the Ninth Circuit's determination that the Title VII standard, which allows for *respondeat superior* liability, *Miller's v. Maxwell Int'l., Inc.*, 991 F.2d 583, 587 (9th Cir. 1993), is correct. Under the Federal civil remedial scheme for discrimination, there are *two* separate and distinct statutes providing for remedies in cases of employment and educational discrimination. Employment discrimination is handled pursuant to 42 U.S.C. §

2000e *et seq.*, commonly known as "Title VII of the Civil Rights Act of 1964" (hereinafter "Title VII"). Under Title VII, 42 U.S.C. § 2000e(b), an "employer" is defined as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year and *any agent of such a person*." *Id.* (emphasis added).

Educational discrimination, on the other had, is prohibited by on the Federal level by 20 U.S.C. § 1681, known as "Title IX of the Education Amendments of 1972" (hereinafter "Title IX"). The important distinction is that, under Title IX, the "agent" provision is *absent* from the definition of an educational institution. 20 U.S.C. § 1681(c). Thus, there is a higher standard in order to make a Federal claim of discrimination against an educational institution than there is in the employment context, as "agents" are *not* covered under the latter statute. *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274, 290 (1998).

However, under the Idaho Human Rights Act, employment *and* educational discrimination are prohibited under the ***same*** statute – to-wit: Idaho Code § 67-5901 *et seq.* Most importantly, the Idaho statute *specifically* includes the key word "***agent***" in its definition of an Educational Institution in Idaho Code § 67-5902(10). The distinction between the standard for employer and educational institution liability for the acts of its employee in the Federal scheme is *absent* in the State remedial scheme for discrimination claims. Ergo, the Federal cases which analyze employer liability for the discriminatory acts of its agent in the Title VII employment context *are* instructive, while the Title IX cases are *not*. Thus, the IHRA is analogous to the Title VII, not the Title IX, Federal standard with regard to sex discrimination

claims.

B. *Faragher/Ellerth* Affirmative Defense.

The majority of the arguments and discussion set forth in Respondent's Brief are adequately briefed in Appellant's Opening Brief, as well as the Memoranda in Opposition to Summary Judgment that are on the record herein, and, thus, Appellant hereby incorporates and re-asserts here arguments set forth therein.

Throughout the course of this case, and in its briefing, Respondent relies heavily upon the *Faragher/Ellerth* affirmative defense, in which an employer may defeat a claim for sexual harassment if: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff . . . unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998). Respondent's Brief at 13–16. It should be noted, however, that the defense is unavailable if adverse action was, actually, taken. *Id.* at 808.

On the availability of the *Faragher* defense, Respondent claims that no adverse action was taken, and that the change from an "I" grade to an "F" occurred automatically as of a certain date. Respondent's Brief at 17–18. However, Respondents *also* state that the "I" grade to begin with was a result of favorable action on the part of Friis, contrary to NIC policy. *Id.* Given that Friis was able to provide Appellant with an "I" grade on the prior occasion, a rational trier of fact could reasonably find that the failure to do so *following* the incidents of harassment constituted adverse action. Furthermore, a rational trier of fact could *also* reasonably find that that the

harassment at the hands of Friis made it impossible for Appellant to complete the course, akin to a "constructive discharge" in the employment context, thus resulting in the "F" grade. Therefore, it should be left to the trier of fact as to whether NIC may even *proceed* with the *Faragher* defense, and, thus, Summary Judgment was not appropriate.

However, in the event that Respondent may proceed to assert the *Faragher* defense, Respondent, and the District Court's, primary focus was upon the second element, i.e., that it is relieved from liability on the grounds that Appellant "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Respondent's Brief at 13–16; *Faragher* 524 U.S. at 807. In response to Appellant's argument that she *had*, in fact, informed NIC employees of her discomfort with Friis, Respondent cites to the case of *Hill v. American General Fin., Inc.*, 218 F.3d 639, 643 (7th Cir. 2000), in which the plaintiff had sent *anonymous* letters (one under a fictitious name), which she then *denied* writing. *Id.* at 641. Of course, no reasonable employer could effectively investigate an anonymous complaint, especially when the complainant would not even acknowledge having made said complaint. In this case, the counselor and the teaching assistant had *ample* opportunity to follow up, ask additional questions, or start a preliminary investigation, but failed to do so – a far cry from an anonymous and fictitiously signed letter subsequently disavowed by the plaintiff. On these facts, a rational trier of fact could reasonably find that Appellant had made a reasonable effort at notification at that point.

Even if this Court should find that these earlier reports were not a reasonable effort at notification, again, the Federal Courts *have* held that, in some circumstances, fear of retaliation

can justify a delay in reporting the harassment. *Weger v. City of Ladue*, 500 F.3d 710, 725 (8th Cir. 2007); *Reed v. MBNA Marketing Systems, Inc.*, 333 F.3d 27, 35–36 (1st Cir. 2003); *Mota v. University of Texas Houston Health Science Center*, 261 F.3d 512, 525–26 (5th Cir. 2001). Furthermore, the Courts which have discussed when a delay may be reasonable have wisely declined to adopt any "bright line test" as to the reasonableness of the extent of such a delay. *Reed*, 333 F. 3d at 35; *Mota*, 261 F.3d at 525. Given the fact-driven nature of discrimination cases, Appellant would urge this Court to examine "reasonableness" on a case-by-case basis, to be determined, in most cases, by the trier of fact, rather than adopting a "one-size-fits-all" test for reasonableness of the fear or the delay. It should be noted that, in *Mota*, the Court allowed a sexual harassment claim to proceed when the plaintiff did not formally report the harassment until *eight* months following the last incident. *Mota*, 21 F.3d at 525.

Next, Respondent argues that the "reason for reporting the harassment was inconsistent with Title VII," and goes on to discuss the negative effects of the "F" grade. Respondent's Brief, 34–36. However, it is perfectly reasonable for a civil plaintiff to seek compensation for damages incurred as a direct and proximate result of what she perceived to be adverse educational action, and one can certainly infer that, even though the *primary* objective of Title VII (in this case, the IHRA) may be to prevent further harassment, compensation for damages proximately caused by said harassment is most *certainly* a *secondary* objective. Furthermore, monetary compensation to damaged plaintiffs serves a deterrent effect in providing an incentive for prevention of discriminatory behavior in the future and by others.

C. Motion for Reconsideration.

Finally, Respondent argues that the Motion for Reconsideration did not require the submission of new or additional facts or evidence, and relies upon the Court of Appeals' decision in *Johnson v. Lambros*, 143 Idaho 468, 473, 147 P.3d 100, 105 (Ct. App. 2006), which declined to adopt a strict requirement of new facts or evidence in order to justify a grant of reconsideration. Being a decision of the Court of Appeals, to the extent that the *Johnson* decision is inconsistent with this court's ruling in *Coeur d'Alene Mining Co. v. First Nat. Bank of North Idaho*, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990), this Court's decision in the latter case would control. However, even though the Court of Appeals felt that requiring new evidence to support a Motion for Reconsideration "would prevent a party from drawing the trial court's attention to errors of law or fact in the initial decision, precluding correction of even flagrant errors except through an appeal," *Johnson*, 143 Idaho at 473, 147 P.3d at 105, that does not grant the district court the absolute ability to grant reconsideration without *some* basis for doing so.

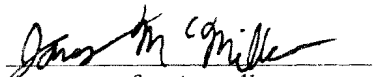
Taking *Coeur d'Alene Mining Co.* and *Johnson* together, Appellant would submit that the mere citation of additional persuasive authority is not sufficient to justify a reconsideration of the District Court's prior decision. As such, the District Court abused its discretion in granting the motion for reconsideration, and, it remains, that the District Court's decision should be REVERSED and REMANDED for further proceedings.

III. CONCLUSION

WHEREFORE, for the foregoing reasons, the judgment of the District Court should be REVERSED, VACATED, and the matter REMANDED to the District Court with instructions pursuant to the legal and equitable principles set forth hereinabove.

DATED this 10th day of August, 2011.

JAMES McMILLAN,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of August, 2011, I caused to be served two (2) true and correct copies of the foregoing on the following by the method indicated below:

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